In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 456

REIES LOPEZ TIJERINA AND JERRY NOLL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) and of the district court (Pet. App. B) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1969. On July 11, 1969 the time for filing a petition for a writ of certiorari was extended to August 11, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a pre-trial order entered by the district court at petitioners' behest and without objection is valid, where the order prohibited any attorney, witness or defendant in the pending criminal case from making any "public statements" regarding the "jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court."

2. Whether petitioners were properly found wilfully to have violated the order so as to be guilty of contempt.

STATEMENT

The facts are not in dispute and are set forth in the opinion below (Pet. App. A, 2-3). As there found, the present contempt proceeding is an outgrowth of petitioners' prosecution (with three others) in the United States District Court for the District of New Mexico for various federal offenses, principally assaulting officers of the United States Forest Service in the performance of their official duty. See *United States* v. *Tijerina*, 407 F. 2d 349 (C.A. 10), petitions for writs of certiorari pending, Nos. 219, 434 Misc. and 436 Misc. this Term. The parties were concerned with pre-trial publicity and the empanelling of an impartial jury in that case. (See 407 F. 2d, at 354 & n. 15; see also Pet. App. A, 7-8). On October 17, 1967, a pre-trial hearing to discuss the problem of pre-trial publicity was held; counsel for all parties were present. Defense counsel had suggested that the court make an order restricting extra-

judicial statements and the court stated its intent to make such an order. Counsel for Tijerina then directed the court's attention to a convention of the Federation of Free City States[1] which was to be held in a few days. Later, the court furnished counsel with copies of the proposed order, which made no exception for this convention. No counsel made any objection. An order was then entered prohibiting the attorneys, the witnesses, and the defendants from making any "public statement, written or oral, either at a public meeting or occasion or for public reporting or dissemination in any fashion regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses or rulings of the Court." See Pet. App. A, 3 n. 1.

The Federation of Free City States convention was held in Albuquerque on October 21 and 22, 1967. It was open to the public on payment of an admission fee, and newspaper reporters and plainclothes police attended. Both petitioners spoke to the gathering, which apparently numbered between two hundred and six hundred persons. Their statements, two of which were tape-recorded, appear in full in the opinion below (Pet. App. A, 6-7). On the basis of these statements, the United States Attorney filed an application for, and the trial judge issued, an order to show cause before another district judge why petitioners should not be held in contempt. See F.R.

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[1] Petitioner Tijerina was the president of this organization, a group of Spanish Americans who claimed property rights in large areas of New Mexico pursuant to the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico.

Crim. P. 42(b); 18 U.S.C. 401(3). After an evidentiary hearing, the district judge made findings of fact and conclusions of law in which he determined that both petitioners had "knowingly, deliberately, and wilfully violated" the trial judge's order prohibiting public statements about the case and that they were guilty of criminal contempt. See Pet. App. B, 14-19. Petitioners were sentenced to serve thirty days in jail and to pay fines of $500. The court of appeals affirmed (Pet. App. A).

ARGUMENT

In urging that the present petition for certiorari should be denied, we rely in the main on the thorough opinion of the court below. We add, however, the following observations.

1. Petitioners' principal contention is that the trial judge's order forbidding them from making any public utterances about the merits of their pending criminal case was invalid because it did not purport to rest on a finding that such statements would present a "clear and present danger" that an impartial jury could not be empanelled or a fair trial could not be had, but rather rested on a finding that there was a "reasonable likelihood" (see Pet. App. A, 3 n. 1) that prejudicial news prior to trial would produce this effect. Petitioners argue that the clear and present danger standard is mandated by this Court's decisions in *Bridges* v. *California*, 314 U.S. 252; *Pennekamp* v. *Florida*, 328 U.S. 331; *Craig v. Harney*, 331 U.S. 367; and *Wood* v. *Georgia*, 370 U.S. 375. In those cases, however, there was no judicial order

which was in effect prohibiting the making of public utterances about a pending criminal case. The standard fashioned in those cases—*i.e.*, that the remarks must have created a clear and present danger to the fair administration of justice—limits the circumstances in which a court which has *not* entered a protective order, designed to curtail potentially prejudicial publicity, nevertheless seeks to punish by criminal contempt a person, whether party or outsider, for his public statements about the case. Where the possibility of prejudicial publicity has not been found to require such an order, protection of the speaker requires a stringent standard to be applied in a contempt proceeding; its sole purpose is an after-the-event vindication of the power of the court to insure a fair trial. In that situation, there must be some assurance that the speaker must have known that his remarks threatened to destroy the fairness of the pending criminal trial.

The situation is different, however, where prior warning has been given. In more recent cases, this Court has recognized that the most desirable and effective way to deal with the increasingly prevalent problem of prejudicial publicity is by remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frus-

trate its function." *Sheppard* v. *Maxwell*, 384 U.S. 333, 363. In *Sheppard*, a state case which was reversed because of massive prejudicial news occurring while the trial was in progress, the Court was highly critical of the failure of the trial judge to take effective measures to prevent the inflammatory publicity. It observed (384 U.S., at 361):

> More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as * * * the identity of prospective witnesses or their probable testimony; any belief in guilt or innocence; or like statements concerning the merits of the case. See *State* v. *Van Duyne*, 43 N.J. 369, 389, 204 A. 2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements.

While the Court in *Sheppard* did not have occasion to discuss the degree of danger to the administration of justice sufficient to support such an order, it clearly was not thinking in terms of a "clear and present danger" test. Such a test would allow the imposition of restrictions on public statements concerning a pending case only after a highly charged and inflammatory atmosphere (presumably the result of *prior* prejudicial publicity) had already developed. We believe the court of appeals was correct in its conclusion (Pet. App. 11) that in balancing the rights of public expression and fair trial, the former has never been preferred. The demands of the latter

require that judges be empowered (and indeed encouraged) to enter orders prohibiting potentially damaging types of public statements by parties or outsiders about a pending case whenever, in their judgment, such statements offer a "reasonable likelihood" of preventing a fair trial. A prohibition on public utterances about the case, operative only for the duration of the pre-trial period or trial, and subject to reexamination if circumstances change,[2] is a modest price to exact for insuring the fairness of trial proceedings. We therefore submit that, as the court of appeals held (Pet. App. A, 10), the trial judge in this case applied the proper standard in promulgating his order.

2. Petitioners also urge that they could not be punished for wilfully violating the court's order because only the accused have the right to a fair trial, and they were therefore guilty at most only of choosing to injure themselves (or, as they phrase it, to "forego assertion of the right to fair trial", Pet. 11) by their statements. The argument is clearly without merit. They could hardly choose to waive their co-defendants' rights to fair trial. And, as the court below held (Pet. App. A, 9-10), the public, represented by the government, has an equal interest in seeing that justice be done in a criminal case. See *Wade* v. *Hunter*, 336 U.S. 684, 689; *Mares* v. *United States*, 383 F. 2d 805, 808-809 (C.A. 10); cf. *Singer* v. *United States*, 380 U.S. 24. This Court recognized

[2] In the federal courts, such an order might be immediately appealable to a court of appeals as a "final decision" under 28 U.S.C. 1291. See *Stack* v. *Boyle*, 342 U.S. 1.

in *Sheppard* v. *Maxwell*, 384 U.S. 333, 361 (quoted *infra*, p. 6) that an order prohibiting public statements may be entered with respect to the accused in a criminal case, as well as any attorney, witness, law enforcement officer, or court official.

Finally, petitioners contend (Pet. 11-12) that their public statements at the convention did not constitute a violation of the court's order. This question is one necessarily limited to the particular facts of the present case. And, on those facts, there was a sufficient basis for the trial court to conclude that the remarks made, however general, were a deliberate flouting of the court's order, punishable under it for their tendency to prevent a fair trial. It hardly lies with petitioners, after having recommended through counsel that such an order be adopted and having failed to object to the order as proposed, to protest that the order was drawn too broadly or too vaguely.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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